

# Discrimination Complaint Processing Update



Office of Resolution Management  
Department of Veterans Affairs  
[www.va.gov/orm](http://www.va.gov/orm)

**“Honoring and Serving our Nation’s Veterans by Promoting  
Discrimination-free Environments”**

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***From the Deputy Assistant Secretary***

**Spring 2005**



## **ADR – A Valuable Tool**

Alternative Dispute Resolution (ADR) is a valuable tool for resolving work place disputes. While we have seen an increase in the use of ADR over previous years, more must be done to encourage both managers and employees to see the benefits of this proven process and to use it to resolve issues that negatively impact employees, managers, and the work environment. ADR is a proven, successful process for resolving work place disputes. Using ADR is a “win – win” situation for everyone.

VA has increased its efforts to promote the use of Alternative Dispute Resolution (ADR) throughout the Department and to increase the number of employees and managers who use ADR to resolve work place disputes. Meetings have been held with representatives of the Administrations and VACO to develop plans to increase the use of ADR.

In fiscal year 2004, the Secretary set a goal that 80 percent of VA’s employees receive ADR awareness training. This training was made available to all VA employees, on-line, resulting in an increase in the number of VA employees – to 91.8 percent – who received this training. This is an example of the efforts underway to educate employees and managers on the benefits of ADR. This effort will continue in the upcoming year.

We are also taking steps to increase the number of available mediators in ORM and are expanding our efforts to inform facility managers and employees of their availability.

Your support is a key component in our efforts to address work place disputes at the earliest opportunity. The first step is to build effective ADR programs.

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**A successful ADR program starts with the support of leadership and management. It also involves the willingness of all parties to discuss issues in an open and cooperative manner. Senior managers can set the tone and sell the benefits of ADR to all employees.**

**To help in this effort, we are providing, in the following pages, an overview of ADR and its use in VA. We hope this information is of value to you in helping to increase the awareness of ADR, to encourage its use in resolving work place disputes, and in building “Employer-of-Choice” environments throughout VA.**

**James S. Jones**

# Advantages of Using ADR

Alternative Dispute Resolution (ADR) is a quicker and less costly means of addressing work place disputes. Mediation is VA's preferred method of ADR.

Mediation offers a win-win environment where both parties benefit. Sometimes a resolution is not reached. However, other benefits may be gained from the mediation session. Some of these benefits are (1) a better understanding of the issue, (2) improved working relationships, (3) improved communication, (4) an opportunity to express one's feelings, and (5) cost savings can be realized if complaints are resolved prior to formal complaints being filed. Mediation is a form of communication, and many conflicts often arise out of communication issues.

Mediation is offered to all complainants and responding managing officials at the counseling stage of the EEO complaint process and later at the intake and investigation stages, if it was not agreed upon earlier. Mediation is possible at any time prior to a decision by the Office of Employment Discrimination Complaint Adjudication or the Equal Employment Opportunity Commission.

What are the advantages of ADR? The following chart provides a comparison of ADR/mediation to the EEO complaint process.

Advantages of ADR	
Mediation	EEO Complaint Process
Fast	Up to 180 days for an investigation; more for a hearing
Mediators do not make decisions or force decisions	EEOC and OEDCA decide the merits of the case
Mediators are impartial	EEOC and OEDCA judge the actions of parties to the complaint
Informal	Formal – governed by regulations
Free	ORM's budget and cost of time employee is away from work
Confidential	Testimony is taken, records are maintained; Not confidential.

As you can see from this chart, mediation offers distinct advantages that benefit both management and employees in resolving work place disputes.

Although VA's 10.6 percent ADR participation rate is below the government-wide average of 43 percent, the resolution rate is the third best in government, 79.2 percent. This is 49 percent higher than the government-wide average of 48.7 percent. This result shows the effectiveness of ADR.

We hope to increase both the ADR participation and resolution rates in fiscal year 2005 through further education on the benefits of ADR and the adoption of formal agreements by the Administrations that ADR will be accepted by management in all cases where it is appropriate, cases that are not appropriate are rare.

ORM is a valuable resource in promoting the use of ADR in VA. In addition to offering ADR throughout the complaint process, ORM provides:

- ADR Program Design

ORM assists the Administrations in designing and implementing mediation programs at their facilities. This includes developing mediation policies and referral programs; developing marketing strategies; providing mediation skills and awareness training to supervisors and employees.

- ADR Awareness Training Video

To encourage the use of mediation throughout the complaint process, ORM sponsored the development of an ADR training video, "The Mediation Zone." The video was distributed VA-wide through satellite broadcasts, VHS, DVD, and other modalities. This 31-minute web-cast, featuring video and audio streaming, explains the mediation process and demonstrates its usefulness.

It is available at <http://vaww.va.gov/orm/adr.htm>.

- VA Certified Mediators

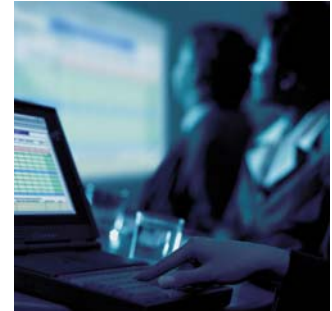
A list of VA certified mediators is available at <http://vaww.va.gov/orm/adr.htm>.

For more information, contact your local ADR Coordinator or ORM's ADR Program Managers: LaMont Johnson at (202) 501-2925 and MaryEllen Garcia at (650) 614-9843.

# Executive Mediation Training

*Lewis Henson, Learning Resources Officer*

ORM recently conducted its 18<sup>th</sup> “Executive Mediation Session” training in Atlanta, GA. The training was held in Atlanta, Georgia, March 29 – April 1, 2005. The Justice Center of Atlanta (JCA), one of the Nation's top mediation trainers, conducted the training. There were 24 VA senior executives and SES candidates in attendance.



The Executive Mediation Session is a 20-hour, three-day course that ensures participants are well versed in and supportive of mediation principles, which we believe will help foster the use of alternative dispute resolution and reduce discrimination complaint activity. The course is intensive, highly participatory, and designed to increase knowledge of the language of neutrality and resolution, as well as enhancing communication and negotiation skills. This course focuses on disputes that arise in the workplace, including EEO grievances; complaints concerning the Americans with Disabilities Act and the Civil Rights Act of 1964, (EEO matters); and grievances of federal sector employees who must implement 29 CFR Part 1614.

This training was rated as “Excellent” by 100% of the participants.

*Participants had this to say about the program:*

- *“Excellent program overall—highlighted advantages of mediation. All trainers were superb!”*
- *“Excellent workshop”*
- *“All instructors were excellent; well prepared and knowledgeable”*
- *“I will tell others about this outstanding course”*
- *“Gave me a new viewpoint on mediation”*
- *“Program was an excellent overall experience”*

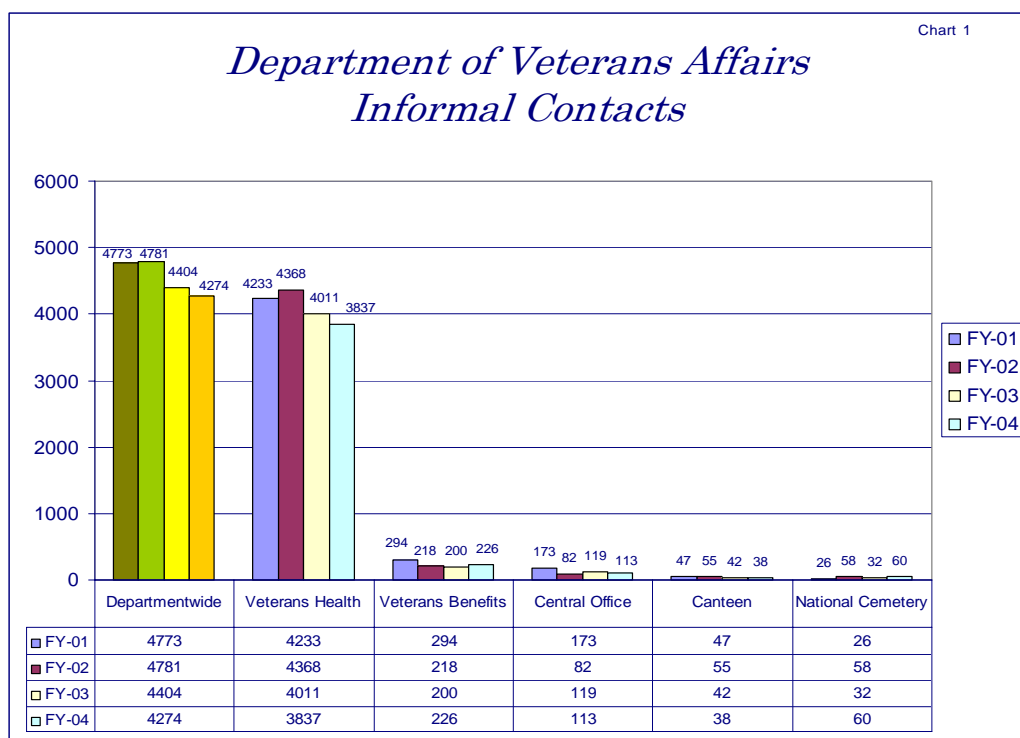
For more information on ORM sponsored training, contact Lewis Henson, Learning Resources Officer at (737) 327-1232 or you can visit our Web site <http://vaww.va.gov/orm/adr.htm>.

# Department-Wide Complaint Activity Trend Data

ORM is responsible for producing trend data charts of EEO activity. Trends are charted for both informal and formal complaint activities for the three Administrations (Veterans Health Administration, Veterans Benefits Administration, National Cemetery Administration), VA Central Office, and Canteen Service on an annual basis.

These charts are not intended to provide an in-depth analysis of the reasons complainants initiate counseling or why they elect to file formally, but rather are a comparison of complaint activity. Trend data for fiscal year 2004 was recently issued to VACO and each Administration.

The chart below, which shows VA-wide informal complaint contact information for fiscal years 2001 to 2004, is an example of the types of trend data provided by ORM.



For more information, contact Peggy Joyner, ORM Quality Assurance Officer at (202) 501- 2770.

# SELECTED EEOC DECISIONS

Source is "The DIGEST of Equal Employment Opportunity Law," Volume XV, No. 3, Summer Quarter 2004

The following are excerpts from cases decided by the EEOC involving the Department of Veterans Affairs. Managers may find this information helpful in addressing work place issues covered by Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin; and the Rehabilitation Act of 1973, which prohibits employment discrimination against people with disabilities in the federal sector;

## Under Title VII

**Racial Discrimination: Hostile Work Environment.** The Commission found that complainant was subjected to unwelcome conduct related to his race when a co-worker made unprompted racially- charged comments. The Commission determined that the complainant had established that the incident was sufficiently severe to render his work environment hostile. This situation was exacerbated by the fact that the co-worker had supervisory authority over complainant because the co-worker was the Team Leader. The Commission found liability due to the failure of the agency to proffer that it had a policy and complaint procedure against the harassment. The Commission ordered the agency to provide appropriate training of, and consider disciplining, the officials involved, and give complainant notice of his right to submit evidence in support of his claim for compensatory damages. *Wilson v. Department of Veterans Affairs*, EEOC Appeal No. 01A30907 (February 23, 2004).

## Under Disability Law

**Pre-Employment Inquiry Violated Rehabilitation Act.** The Commission found that an agency official's question to complainant during a job interview asking whether he could really do the job since he was "drawing disability" for his back, flat feet, and bad leg constituted a prohibited pre-employment inquiry, and thus was impermissibly disability- related. The Commission noted that restrictions on such disability-related inquiries and medical examinations apply to all employees and not just to those with disabilities. EEOC ordered the agency to review and, if necessary, revise its pre-hire interview questions; provide training to the agency official, as well as to consider disciplining him; and to investigate complainant's entitlement to compensatory damages. *Edwards v. Department of Veterans Affairs*, EEOC Appeal No. 01A30010 (February 12, 2004).

**Discontinuation of Accommodation Violated the Rehabilitation Act.** After accommodating complainant's restrictions concerning lifting and pushing/pulling, the agency sent complainant for a fitness for duty examination, which determined that she was fit for duty with a temporary weight restriction. Complainant, a Pharmacy Technician, continued to request reasonable accommodation. The Commission found that the agency failed to provide reasonable accommodation when her supervisor required complainant to push an IV cart, which exceeded her restrictions, and admonished her for insubordination when she refused to push a dose cart and lift a box of paper. The Commission noted the supervisor's assertion that the agency had been providing complainant with assistance and removing the lifting and pushing/pulling requirements of her position for some time. The Supervisor did not furnish any argument or evidence that continuing with the assistance would cause an undue hardship. The Commission concluded that the agency violated the Rehabilitation Act in failing to provide reasonable accommodation and was liable for compensatory damages because it failed to supply either argument or evidence that it made a good faith effort to reasonably accommodate complainant. EEOC ordered the agency to determine, with complainant's cooperation, whether continued reasonable accommodation was needed and in what form; to remove reference to the proposed admonishment from complainant's record; and to give complainant notice of her right to submit objective evidence in support of her claim for compensatory damages. *LaCombe v. Department of Veterans Affairs*, EEOC Appeal No. 01A23543 (March 24, 2004).

**Findings of Direct Threat to Self and Others**

In *Lavery v. Department of Veterans Affairs*, the complainant alleged that he was discriminated against on the basis of disability (heart problem) when he was removed due to his failure to provide a medical clearance that he was fit to work. While complainant was on a temporary appointment, he became ill and asked his supervisor to be placed in a sick leave status while he went to the hospital. The complainant was treated and admitted, but discharged himself and returned to work. His supervisor advised him that he must provide a medical release to continue working. When he returned to the hospital they readmitted him and requested that he have a medical procedure. The complainant decided against the medical procedure and again tried to return to work. Thereafter, his supervisor terminated him for failure to provide medical documentation establishing that it was safe for him to return to work. At the time, the agency was not aware of complainant's heart problem and complainant did not ask for a reasonable accommodation. Subsequently, the agency conducted an individualized assessment and found that complainant was in imminent danger of having a severe coronary event. The Commission held that an individualized assessment showed that returning the complainant to work posed a direct

threat to complainant, and concluded that the agency had not violated the Rehabilitation Act when he was terminated.

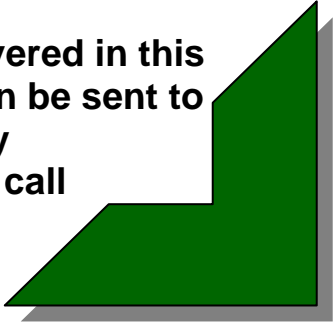
In *Knill v. Department of Veterans Affairs*, complainant alleged that he was discriminated against on the basis of disability (mild retardation, learning disabilities, and auditory processing problems) when he was terminated from his job. The Commission found that complainant was a threat to himself and others and stated that "the agency's termination of complainant was not based on generalized fears about his ability to perform the essential functions of his job but on its individualized assessment of complainant's unpredictable unwillingness to obey his supervisors and his brandishing a weapon." Besides brandishing a weapon, he tried to scare his supervisor by driving his car approximately two feet behind his supervisor's car, backing up, and pulling forward three or four times. Moreover, at work complainant would become agitated and frustrated and begin to yell. His colleagues and supervisors could not calm him down and he was unresponsive to their admonishments. Eventually, complainant was placed on leave without pay status and asked to undergo a fitness for duty examination. The agency allowed complainant to choose a psychiatrist and supplied one of its own to determine if he should return to work. After both psychiatric evaluations complainant was not allowed to return to work. Thus, the Commission found that the agency met its burden by presenting objective evidence of a direct threat.

For more information, visit <http://www.eeoc.gov/federal/appellate.html>.



## We Would Like to Hear From You

Your suggestions or comments concerning topics covered in this newsletter or topics you would like to see covered, can be sent to Terry Washington, ORM External Affairs, by e-mail at [terry.washington@va.gov](mailto:terry.washington@va.gov) or you can call (202) 501-2827



Discrimination Complaint Processing Update is a quarterly publication of the Office of Resolution Management. Contact Terry Washington, External Affairs Program, by e-mail or by calling (202) 501-2800 concerning the contents of this newsletter. Additional information on ORM services and programs is available at <http://www.va.gov/orm>.